UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO COMPEL GRANTED: June 27, 2007

CBCA 52

TAS GROUP, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Carolyn Callaway of Carolyn Callaway, P.C., Albuquerque, NM, counsel for Appellant.

Timothy P. McIlmail, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, counsel for Respondent.

SOMERS, Board Judge.

Appellant seeks an order compelling respondent to answer appellant's Interrogatory 18. Appellant served Interrogatory 18 on respondent on May 16, 2007. The interrogatory reads as follows:

> Interrogatory 18: Identify any and all persons, including experts, you may call to testify at trial at this matter, the matters to which they may testify, the basis of their knowledge about the matters to which they may testify, and their job titles at the time of the incident and today.

Appellant's Motion to Compel, Attachment 1. On June 7, 2007, the Government objected to the interrogatory, stating:

> We object to this interrogatory because it seeks attorney work product and, in view of the requirement imposed by the Board's January 16, 2007 pretrial scheduling order to disclose trial witnesses and the substance of their testimony by July 3, 2007, the request seeks to impose an unreasonable burden and an undue disclosure obligation.

Appellant's Motion to Compel, Attachment 2.[1]

The principal issue here is whether the Government's objections to the interrogatory are well founded under the Federal Rules of Civil Procedure. Under Federal Rule of Civil Procedure 26, parties may generally "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of a party . . . . Relevant information need not be admissible at the trial if the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *LFH, LLC v. General Services Administration*, CBCA 395, et al., 07-1 BCA ¶ 33,537. A party is entitled to object to discovery requests, including interrogatories, but "[a]ll grounds for an objection to an interrogatory shall be stated with specificity." Fed. R. Civ. P. 33(b)(4).

The Government first objects to the interrogatory on the grounds that it seeks attorney work product. The work product doctrine applies to attorney work product prepared in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947). Under Federal Rules of Civil Procedure 26(b)(3), the scope of the privilege is limited to "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney . . .)." *See, e.g.*, *AAB Joint Venture v. United States*, 75 Fed. Cl. 448, 454 (2007) (discussing the work product doctrine). The purpose of the privilege is to "encourage[] attorneys to write down their thoughts and opinions with the knowledge that their opponents will not rob them of the fruits of their labor." *In re EchoStar Communications Corp.*, 448 F.3d 1294, 1301 (Fed. Cir. 2006).

Although the work product doctrine protects work product created by the attorney, the privilege does not protect facts contained within or underlying attorney work product. *In re Unilin Decor N.V.*, 153 F. App'x 726, 728 (Fed. Cir. 2005). In this case, the interrogatory seeks only facts relating to the identity of potential witnesses that may be called to testify at

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[1] The Board's June 12, 2007, scheduling order changed the date for the exchange of pretrial materials, which is now scheduled to occur no later than August 10, 2007. Trial is scheduled to begin on August 20, 2007.

trial. Such information is not protected under the work product doctrine and is discoverable. *See, e.g.*, *AAB Joint Venture*, 75 Fed. Cl. at 454 (citing *Korbell v. Reid Plastics, Inc.*, 136 F.R.D. 575, 580 (W.D. Pa. 1991)). Therefore, respondent has not met its burden of establishing its entitlement to protection under the work product doctrine. Moreover, the party asserting the work product doctrine must set forth objective facts to support its claim of protection. *AAB Joint Venture*, 75 Fed. Cl. at 455. Respondent has failed to satisfy this requirement. Accordingly, the Board rejects the Government's invocation of the work product doctrine.

In addition to the assertion of the work product doctrine, the Government asserts that the interrogatory "seeks to impose an unreasonable burden and an undue disclosure obligation." This aspect of the Government's objection is indefensible in light of the broad discovery obligations set forth in the Federal Rules of Civil Procedure. As noted previously, pursuant to Rule 33(b)(4), when objecting to an interrogatory, a party is required to state all grounds for objection with specificity. Consistent with that, most federal courts have required that a party objecting to an interrogatory on the grounds of undue burden specifically show how the interrogatory is burdensome; a mere statement that the interrogatory is unduly burdensome is inadequate. *AAB Joint Venture*, 75 Fed. Cl. at 457-58 (citing *McLeod v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990); *Panola Land Buyers Ass'n. v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985); *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982); *Burns v. Imagine Films Entertainment, Inc.*, 164 F.R.D. 589, 593 (W.D.N.Y. 1996)).

Decision

Appellant's **MOTION TO COMPEL** is **GRANTED**. Respondent must answer the interrogatory no later than July 13, 2007.

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JERI KAYLENE SOMERS
Board Judge